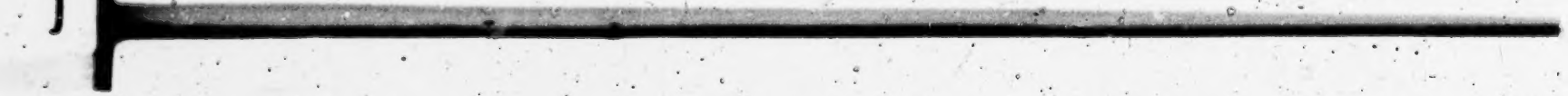

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

CAROLENE PRODUCTS COMPANY, a corporation, CHARLES HAUSER and WILLIAM H. HARTKE,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND SUPPORTING BRIEF.

SAMUEL H. KAUFMAN,
*Attorney for Petitioners.*

SAMUEL H. KAUFMAN,
GEORGE TROSK,
MILTON ADLER,
*of Counsel.*

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IN THE

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OCTOBER TERM, 1943

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| CAROLENE PRODUCTS COMPANY, a corporation, CHARLES HAUSER and WILLIAM H. HARTKE, Petitioners, vs. UNITED STATES OF AMERICA, Respondent. | No. |

## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, by SAMUEL H. KAUFMAN, their attorney, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, rendered January 10, 1944, which affirmed a judgment of the United States District Court for the Northern District of West Virginia, convicting petitioners of violating Sections 61, 62 and 63 of Title 21, United States Code, commonly referred to as the "Federal Filled Milk Law".

### Jurisdiction.

The basis of jurisdiction is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Summary Statement of Matters Involved.

The case arises under the Federal Filled Milk Act (hereinafter referred to as the "Act") approved March 4, 1923 (42 Stat. 1486, 21 U. S. C. 61).

The Act prohibits the shipment in interstate and foreign commerce of "filled milk", and imposes as penalties for violation a fine of not more than $1,000., or imprisonment for not more than one year, or both.

The Act defines "filled milk" as

> "any milk, cream or skimmed milk, * * * to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream or skimmed milk, * * * "

Following the definition is a paragraph reading as follows:

> "It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health and its sale constitutes a fraud upon the public."

On October 21, 1942 petitioners were indicted on eight counts, each separately charging an interstate shipment of "filled milk" into West Virginia. The products shipped were known as "Milnut", "Milnot" and "Carolene", but inasmuch as the distinction between them does not affect the questions here involved, the term "Carolene" will be used in referring to the contents of all the shipments.

The case was tried before Hon. William E. Baker, United States District Judge, Northern District of West Virginia, without a jury.

Petitioners stipulated most of the Government's case, to wit, (1) that the shipments charged in the indictment were made by Carolene Products Company; (2) that the Government's chemists, if called, would testify (a) that they found in each sample an oil or fat other than butter fat, namely, either coconut oil or cottonseed oil, blended or compounded with skimmed milk; (b) that the product, in their opinion, was virtually indistinguishable from evaporated milk in appearance, taste, color, odor and consistency, and (c) that the product was packed in the same style and size of container as that in which evaporated milk is customarily packaged (App. pp. 31-35; 95; 99-101.)

The Government offered no proof that Carolene was not wholesome or nutritious, or that it was adulterated or injurious to public health, or that its sale constituted a fraud on the public.

The Government admits that there is no proof in the record that either of the individual petitioners personally made, directed or even had knowledge of the shipments complained of, individual liability being claimed solely because the individual petitioners, president and vice-president of Carolene Products Company, respectively, were the directing heads of the corporation, which made extensive interstate shipments of Carolene (App. p. 46).

In the presentation of its case, the Government called both the individual defendants to the stand, as witnesses.

At the end of the Government's case, the Court denied petitioners' motion to dismiss the indictment.

Petitioners proved that Carolene is a compound consisting of pure pasteurized skim milk, pure refined cottonseed oil or pure coconut oil amounting to 6% of the finished product, and pure high potency fish liver oils containing vitamins A and D. The compound is then evaporated and hermetically sealed in 14½ ounce cans (13 fluid ounces) and then sterilized (App. pp. 218, 224-226). It is undisputed that the product is manufactured under the most modern and sanitary conditions (App. pp. 218-226).

The label prominently states the nature of the product; that it is "not evaporated milk or cream"; that it is "a compound of evaporated skimmed milk, cottonseed oil, and vitamins A and D in fish liver oil", and that it is "especially prepared for use in coffee, baking and for other culinary purposes" (App. p. 17).

Petitioners called witnesses, eminent experts in the medical, biochemical and chemistry fields, and offered Government publications, to establish, among other things:

(1) that the constituents of Carolene—pure, pasteurized, skim milk; pure, refined cottonseed oil, or cocoanut oil, and Vitamins A and D carried in a small quantity of high potency fish liver oils—are now universally recognized as valuable, wholesome and nutritious articles of food in great use throughout the world (App. pp. 141-142, 159-160, 180, 211-213, 231, 269, 273-275; Defts' Exh. 20, 21 and 22 for ident.);

(2) that no part of the value of such constituents is lost or even diminished when compounded to make the product (App. p. 161);

(3) that in 1923, the time of the passage of the Act, no means were known for enriching foods with Vitamins A and D, and the absence of these vitamins in filled milk, as then constituted, was the basis for the Congressional finding that filled milk was "an adulterated article of food, injurious to the public health" (App. pp. 152-153; 244-249; Defts' Exh. 23-28 for Ident.);

(4) that by means of comparatively recent scientific discoveries, the products involved in the indictment have been fortified with Vitamins A and D so that they contain at least as much of these vitamins as that contained in average whole milk (App. pp. 146-148, 153-154, 247; Defts' Exhs. 12 and 13 for Ident.);

(5) that Carolene is a wholesome and nutritious food compound, and is one of the ten most nutritious food products known (App. pp. 211-213; 262-269);

(6) that Carolene may be used safely as a food by humans, including children, and that it is not injurious to the public health (App. pp. 175-176; 211-213).

The foregoing testimony was offered to prove that the Federal Filled Milk Law was not intended to apply to such a product as Carolene, and that if the Act were held to apply to Carolene, the Act would be unconstitutional.

The Trial Court rejected the evidence solely upon the ground that the defense of wholesomeness and high nutritive qualities of Carolene was insufficient in law, in view of the Congressional declaration that "filled milk * * * is an adulterated article of food * * *" (App. 134 and 135).

The Trial Court found petitioners guilty, and fined each of the a $1,000 on each of eight counts in the indictment. In addition, each of the individual petitioners was sentenced to an aggregate of one year's imprisonment on the first four counts and placed on probation on the second four counts for an aggregate of two years after the expiration of the prison term.

The Circuit Court of Appeals affirmed the judgment of conviction, saying that:

> "The fact that the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result does not justify our giving to the statute the restrictive construction for which the defendants contend. This matter is one for the consideration of the Legislature and not the courts."

The court said with regard to the individual petitioners:

> "In the light of the record of this case we are inexorably forced to the conclusion that the individual defendants are both chargeable under the law with knowledge of the eight specific unlawful shipments by the corporation as set out in the indictment,"

and that as far as their being called as Government witnesses is concerned, no reversible error was committed because of the limited testimony elicited from them:

> "Furthermore, the testimony actually elicited from the individual defendants was not only stricken out so far as it related to them, but was in substance actually introduced into the case by exhibits or by stipulation of counsel. Under these circumstances, there was no reversible error in refusing to enter a verdict for the individual defendants;"

## The Questions Presented.

1. Was it error for the learned District Judge to refuse to receive evidence that Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits, without fraud on the public, and having none of the nutritional deficiencies for which Congress banned the interstate shipment of "filled milk"?

2. Did Congress, in proscribing the interstate shipment of "filled milk", intend to ban a product having the high nutritive qualities of Carolene and sold on its merits under honest labels?

3. Did the learned court below err in holding that Carolene is "in imitation or semblance" of milk?

4. If the Act be applicable to Carolene, does it violate petitioners' rights under the due process clause of the Fifth Amendment to the Constitution of the United States?

5. Did the Government establish liability on the part of the individual petitioners?

6. Did the Government violate the individual petitioners' constitutional rights in calling them as witnesses against themselves?

**The Reasons Relied On For the Allowance of the Writ.**

1. Since Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits, without fraud on the public, and having none of the nutritional deficiencies for which Congress banned the shipment of filled milk, the Act was not intended to, and does not, apply to such product.

2. Since Carolene is not "in imitation or semblance of milk", the Act is not applicable to such product.

3. If it be held that the Act is applicable to Carolene, then the Act is an unconstitutional interference with petitioners' rights under the Fifth Amendment to the Constitution of the United States, because Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits without fraud on the public.

4. The Government failed to connect the individual petitioners with the making of the shipments referred to in the indictment. The Government admits there is no evidence that either of the individual defendants participated in the shipments, or directed the making of them, or knew of their being made.

5. The Government violated the constitutional rights of the individual petitioners by calling them to the stand as Government witnesses, and requiring them to be witnesses against themselves.

*This is the first case in any Federal Court attempting to present on the merits the question of the applicability of the Act to Carolene.*

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to the Court for its review and determination the full and complete transcript of the record and all proceedings of the case entitled on its docket "Carolene Products Company, a corporation, Charles Hauser and William H. Hartke, appellants, against United States of America, appellee", and that said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, New York, N. Y.,
February 4th, 1944.

CAROLENE PRODUCTS COMPANY
CHARLES HAUSER
WILLIAM H. HARTKE
By SAMUEL H. KAUFMAN
Attorney for Petitioners

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

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| CAROLENE PRODUCTS COMPANY, a corporation, CHARLES HAUSER and WILLIAM H. HARTKE, Petitioners, vs. UNITED STATES OF AMERICA, Respondent. | No. |

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(Italics ours.)

### Statement.

Reference is respectfully made to the foregoing petition for a statement of jurisdiction, questions presented, and a summary statement of the case.

### Opinions Below.

The opinion of the Circuit Court of Appeals has not yet been reported. The opinion of Judge Baker in the District Court is reported in 51 Fed. Supp. 675 and is printed in the Appendix, pp. 36-51.

## Specification of Errors.

(1) The Circuit Court of Appeals erred in sustaining the ruling of the trial court, rejecting petitioners' offers of proof that Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits, without fraud on the public, and having none of the nutritional deficiencies for which Congress banned the interstate shipment of "filled milk";

(2) The Circuit Court of Appeals erred in holding that Carolene is within the purview of the Act, notwithstanding its nutritional value, its honest labeling and its sale without fraud on the public;

(3) The Circuit Court of Appeals erred in holding that Carolene is "in imitation or semblance" of milk;

(4) The Circuit Court of Appeals erred in holding that the Act, as applied to Carolene, is constitutional;

(5) The Circuit Court of Appeals erred in affirming the judgment of conviction of the individual defendants, (a) because the government failed to connect them with the shipments complained of, and (b) because they were called to the stand by the government as government witnesses and required to be witnesses against themselves, in violation of their constitutional rights.

## ARGUMENT.

### POINT I.

**At the time of the adoption of the Act, "Filled Milk" was a well defined product—a compound of skimmed milk and vegetable oils—deficient in Vitamins A and D. No way was then known by which this vitamin deficiency could be cured, and a compound deficient in these vitamins was the thing, and the only thing, which Congress intended to proscribe by banning "Filled Milk". A method has since been discovered by which this vitamin deficiency can be cured, and this method is employed in the manufacture of Carolene, which contains at least as high a Vitamin A and D content as whole milk, and which is one of the ten most nutritious food products known. Carolene, as now constituted, was not known at the time of the adoption of the Act; it is not within the evil against which Congress intended to legislate by adopting the Act, and, consequently, the Act does not apply to it.**

In affirming the conviction herein, the Circuit Court of Appeals, said:

> "The fact that the inclusion of Carolene within the ambit of the statute leads to a seemingly harsh and inequitable result does not justify our giving to the statute the restrictive construction for which the defendants contend. This matter is one for the consideration of the legislature and not the courts."

In this, we respectfully submit, the learned court below erred.

It is clear from the Act, and from the Congressional hearings which preceded its adoption, that the product then known as "filled milk", which Congress intended to prohibit, was well defined: it consisted of a compound of skimmed milk—a substance inherently deficient in Vitamins A and D—and vegetable oils which did not supply this vitamin deficiency; that no way was then known by which it was commercially possible to cure this vitamin deficiency in a skimmed milk compound: that it was because of this irremediable vitamin deficiency in "filled milk" that Congress declared it to be "an adulterated article of food, injurious to the public health" and banned its shipment in interstate commerce. (Defts. Exh. 23 for Ident., pp. 10, 15, 19, 38, 44, 119, 120, 148; Defts. Exh. 25 for Ident., p. 7611; Defts. Exh. 26 for Ident., pp. 7-8, 27; Defts. Exh. 27 for Ident., p. 6; Defts. Exh. 28 for Ident., p. 3951.)

Petitioners offered to prove that Carolene is not only wholesome and nutritious, but that it contains, quantitatively and qualitatively, at least as high a Vitamin A and D content as whole milk, and is one of the ten most nutritious products known (App. 146-148, 211-213, 262-269).

The learned District Judge declined to receive this evidence on the ground it would be irrelevant and immaterial (App. 134-135).

In so doing, we submit, the learned Court erred, since it is well settled that the court must ascertain and give effect to the legislative intention, and that even though a thing may be within the letter of a statute, it is not within the statute if it is not within its spirit or within the intention of its makers (*Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226; *U. S. v. Aetna Explosives Co.*, 256 U. S. 402, 41 S. Ct. 513, 65 L. Ed. 1013; *U. S. v. American Trucking Associations, Inc., et al.*, 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345).

Petitioners' offers of proof having been rejected by the court solely upon the ground that the facts so offered would be irrelevant and immaterial, it must be assumed, for the purpose of determining the propriety of the ruling, that the evidence offered was in all respects true.

*Barreda* v. *Silsbee*, 62 U. S. (21 How.) 146.

Consequently, the following facts must be deemed to have been established:

(1) Vitamins A and D are a part of whole milk (App. pp. 205-206; 246);

(2) "Filled milk", as known in 1923, the date of the adoption of the Act, was a compound of skimmed milk and coconut oil (*House Committee Hearings*, Defts. Exh. for Ident. 23, p. 10, submitted herewith.);

(3) Vitamins A and D are extracted from milk in the skimming process (App. pp. 142-143; 250.);

(4) The introduction of coconut oil did not cure the deficiency because Vitamins A and D are not found in sufficient quantities in coconut oil (App. pp. 245; 249.);

(5) It was then the universal scientific opinion that it was commercially impossible to introduce Vitamins A and D into the compound (App. pp. 152-153; 246-247.);

(6) Since then, science has discovered a way in which it is commercially possible to fortify a skimmed milk coconut oil compound with Vitamins A and D (App. pp. 153-154; 247.);

(7) This scientific discovery is employed in the compounding of Carolene, with the result that a can of Caro-

lene contains more Vitamin A and much more Vitamin D than is contained in an equivalent amount of whole milk or evaporated milk, and the A and D content of the product is of guaranteed and reliable constancy (App. pp. 146-148; 207; 258; Defts. Exhs. 12 and 13 for Ident.);

(8) Carolene contains more proteins, more calcium, more phosphorous, more minerals and more of the water soluble vitamins* than the equivalent amount of whole milk (App. pp. 152; 250; 253-254; Defts. Exhs. for Ident. 12 and 13.);

(9) Carolene is wholesome, nutritious and non-injurious, and is one of the ten most nutritious food products known (App. pp. 159-160; 211-213; 259; 262-269);

(10) Carolene is marketed in cans, bearing labels which clearly and honestly show that it is not milk or evaporated milk, and precisely what its ingredients are (App. p. 17, Govt. Exhs. 26-32).

The product which Congress intended to prohibit was a compound of skimmed milk and vegetable oil, devoid of Vitamins A and D.

Carolene is not such a product; on the contrary, it has more Vitamins A and D than whole milk, is richer than whole milk in other respects, as well, and is one of the ten most nutritious foods known. Consequently, it is not the type of product which Congress intended to ban, and the Act does not apply to it even if it be within the letter of the Act.

* Water soluble vitamins are found in the skimmed milk portion of whole milk. They are to be distinguished from the fat soluble Vitamins A and D which are found in the butter fat portion of whole milk (App. pp. 143; 246).

In the *Church of the Holy Trinity* case (143 U. S. 457), the leading case on this proposition, this Court said, at page 459:

> "* * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

In the case of *In Re Di Torio*, 8 Fed. (2d) 279, the rule is stated as follows, at p. 280:

> "The spirit or reason of the law is the life of the law, and will prevail over the letter. The meaning of general terms may be restrained by the spirit or reason of the law and general language may be construed to admit implied exceptions."

In *Carolene Products Co.* v. *Mahoney, et al.*, 294 Fed. 902, aff'd. 2 Fed. (2d) 366 (C. C. A., First Circuit), the predecessor Carolene corporation was granted an injunction against enforcement of the Massachusetts "filled milk" statute. The Court held that the Act there involved, if literally construed, would cover the product; it went on to say, however (p. 903):

"It is inconceivable that the Massachusetts Legislature intended any such wholesale condemnation of desirable and widely used food products. Of course, the act is a criminal act, and must be strictly construed. It is unfortunate that the responsibility of initial construction falls on a federal court; but, on the whole, I am inclined to the view that the plaintiff's first contention, that Carolene is not covered by the act, falls under the principle, of which the decision of the Supreme Court in the *Holy Trinity Church* case, 143 U. S. 457, 459, 12 Sup. Ct. 511, 512 (36 L. Ed. 226) is the strongest illustration * * *."

See also:

*Ozawa* v. *U. S.*, 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199;

*U. S.* v. *Aetna Explosives Co.*, 256 U. S. 402, 41 S. Ct. 513, 65 L. Ed. 1013.

The Circuit Court of Appeals approved the conclusion of the District Court that the foregoing contention is not available in a prosecution under the Act, in view of the decision in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234. That case is not authority for the Court's conclusion; indeed, it is to the contrary.

That case arose under an indictment which charged that the product the defendant there had shipped in interstate commerce was (p. 146) an "adulterated article of food, injurious to the public health". The defendant demurred, thereby admitting the charge, so that, as the Court pointed out (p. 154), the only question presented was whether or not Congress had power to pass a law banning the shipment of an "adulterated article of food, injurious to the public health".

In answering that question in the affirmative, this Court did not hold that a defendant, indicted under the Act, could not put in issue the allegation that his product was "filled milk" within the meaning of the Act, or, having raised that issue, show that the Act was not intended to apply to its product. On the contrary, Mr. Justice (now Mr. Chief Justice) Stone said (p. 152):

> "* * * the statutory characterization of filled milk as injurious to health and as a fraud upon the public",

should be deemed a declaration which reveals "the rationale of the legislation", and (p. 153):

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, *and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.*"

The concurring opinion of Mr. Justice Butler is to the same effect (304 U. S., at p. 155.)

Thus, the opinion in *United States v. Carolene Products Company*, 304 U. S. 144, upon which the Circuit Court of Appeals relied, not only lends no support to its conclusion, but distinctly holds the contrary.

The statement in the opinion of the learned court below that an "impressive array of courts" has refused to accept defendants' contentions, requires a word of comment. The "impressive array" referred to by the Circuit Court of Appeals is—

*U. S. v. Carolene Products Co.*, 304 U. S. 144;
*U. S. v. Carolene Products Co.*, 104 F. (2d) 969;
*Hebe v. Shaw*, 248 U. S. 297;
*Carolene Products Co. v. Evaporated Milk Assn.*, 93 F. (2d) 202;
*Carolene Products Co. v. Wallace*, 27 F. Supp. 110, aff'd 307 U. S. 612;
*Setzer v. Mayo*, 9 So. (2), 280;
*Kansas, ex rel. Mitchell v. Sage Stores Co.*, 157 Kansas 404.

The first four cases just cited dealt with the vitamin-deficient product known as "filled milk" at the time of the adoption of the Act.

In *Carolene v. Wallace*, the plaintiff sought a preliminary injunction against threatened criminal proceedings. The Court pointed out that criminal proceedings will not be enjoined unless an immediate great and irreparable loss is threatened, and held that these conditions precedent had not been shown to exist. But the Court did not stop there; *it pointedly indicated that the remedy lay in setting up the nutritious and wholesome nature of the product as a defense in the criminal proceeding, if one should be instituted.*

In *Setzer v. Mayo, supra*, the Supreme Court of Florida, by a vote of four to three, held the Florida Filled Milk Act constitutional. *The majority of the Court, however, pointed out that if the relators could show that the product was wholesome and nutritious, and equal to or superior to whole milk as a food, the product would not be within the condemnation of the Act.* The Court said, at p. 283:

> "If therefore relators can show that notwithstanding their product is produced by substituting cotton seed oil or some other substitute for butter fat and vitamins it is wholesome and nutritious and that it is equal to or superior to whole milk as a food, the test prescribed in the last two cited cases is met and their product relieved from condemnation by the Act."

The Kansas case, decided in October 1943, was decided by a vote of four to three, the deciding vote having been cast by Judge Parker who, as Attorney General of the State of Kansas, had instituted the action and had acted as the relator therein for more than a year. An application for a writ of certiorari in that case will be presented to this Court in time to have that petition considered simultaneously with this one, and the merits of that case are fully discussed there.

After citing the foregoing cases, the Court said that *Mahoney* v. *Carolene Products Co.*, 2 F. (2d) 366 is "contra". Other cases also contra are:

> *People* v. *Carolene Products Co.*, 345 Ill. 166;
> *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62;
> *Carolene Products Co.* v. *Thomson*, 276 Mich. 172;
> *Carolene Products Co.* v. *Banning*, 131 Nebr. 429;
> *State, ex rel. McKittrick* v. *Carolene Products Co.*, 346 Mo. 1049.

In each of the first four cases a State Filled Milk Act was declared unconstitutional. In the Missouri case, the Missouri Filled Milk Act, which is similar to the Federal Act, was held inapplicable to Carolene.

Thus, there is a substantial diversity of opinion among the courts of this country in reference to the constitutionality of a Filled Milk Statute, even as applied to the product as it was constituted prior to the discovery of the vitamin-fortification process.

It is important to note that this is the first case in any Federal Court attempting to present on the merits the question of the applicability of the Act to Carolene.

The authorities to which we have referred above (pp. 12-19), we respectfully submit, indicate the rule which is applicable here. The product with which Congress was

dealing, and the sale of which it intended to prohibit by the Act, was one having a milk base, from which Vitamins A and D had been extracted in the skimming process, and to which it was commercially impossible to add any ingredient which would compensate for the vitamin deficiency thus created.

Carolene is not such a product; it contains more Vitamins A and D than whole milk, is richer than whole milk in other respects as well, and is one of the ten most nutritious food products known (App. pp. 159-160; 211-213; 259, 262-269.)

Such a product, even though it be literally within the words

> "* * * skimmed milk * * * to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat,"

is not a product which Congress intended to ban by the Act, and the product is, consequently, not within the Act. It is, therefore, respectfully submitted:

(1) That the learned court erred in refusing to receive the proof offered by defendants; and

(2) That the learned court erred in holding that the "seemingly harsh and inequitable result" of including Carolene within the ambit of the statute left the court powerless to do more than suggest that "This matter is one for the consideration of the legislature and not the courts"; and

(3) That the learned court erred in holding that Carolene is within the purview of the Act.

## POINT II.

**Carolene is not "in imitation or semblance" of milk: consequently the Act does not apply to it.**

The Act does not proscribe all products compounded of skimmed milk and fats other than milk fats. The "prohibition of the statute", as Mr. Justice Stone said in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151, is

> "inoperative unless the product is 'in imitation or semblance of milk, cream or skimmed milk * * *.'"

The opinion of the learned Circuit Court of Appeals makes no specific reference to this point; the learned District Court held that this requirement had been met because Carolene (App. p. 45)

> "reacts to the human senses as milk would react."

In this, we submit, the Court erred.

The Act was passed in 1923. It adopted verbatim the words "in imitation or semblance" from a statute previously enacted in New York (Section 64, *New York State Agricultural Law*). The words "in imitation or semblance" have been construed by the New York courts. See:

*People* v. *Simpson*, 62 Misc. 240, aff'd 133 App. Div. 889;
*People* v. *Guiton*, 210 N. Y. 1;
*People* v. *Schintzius*, 61 Misc. 410.

The same language had also been used previously in the Federal Oleomargarine Tax Statute (Act of Congress, August 2, 1886, c. 840; 24 Stat. 209) and had been construed by the Federal Court.

See:

*Braun & Fitts v. Comm.*, 125 Fed. 331.

In such circumstances, two well recognized canons of statutory construction are applicable, to wit:

(a) When Congress adopts the terms of a state statute, it is presumed to have adopted the construction placed thereon by the courts of that state; and

(b) When terms used in one Federal act are incorporated into a later one, Congress is deemed to have enacted into the new law the construction which the Federal courts had placed upon the terms of the earlier one.

Both these canons lead to the same result, *i. e.*; that the words "in imitation or semblance" mean similarity intentionally created by the addition or omission of ingredients for the very purpose of producing such similarity, and not a resemblance due to the inherent qualities and attributes of ingredients essential to the creation of the product.

It is unquestioned that in the production of Carolene, nothing is put into it, or taken from it, to disguise it in any way (App. pp. 80-81); its color, odor, texture and appearance are due solely to the nature and attributes of the necessary ingredients of the product (App. pp. 72, 157).

Consequently, under the authorities referred to above, Carolene is not "in imitation or semblance" of milk, within the meaning of the Act.

## POINT III.

**Since Carolene is a wholesome and beneficial food product, fairly labeled and sold on its merits, without fraud on the public, and having none of the nutritional deficiencies for which Congress prohibited the interstate shipment of "Filled Milk", the legislative prohibition, if held applicable to Carolene, would be unconstitutional.**

At the time the Act was passed, the product known as "filled milk" was deficient in Vitamins A and D, and for that reason, as Congress declared, "injurious to public health" and "a fraud on the public". That, as Mr. Justice Stone said (*U. S. v. Carolene*, 304 U. S. 144, 152), reveals "the rationale of the legislation".

It is well settled, however, that even though a statute be valid, as applied to one product, it would be unconstitutional if applied to a product not within its rationale, whether that product be an entirely new one, or an improvement upon one in existence at the time of the enactment of the statute.

In *Nashville, etc. Ry. v. Walters*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, Mr. Justice Brandeis said, at p. 445:

> "a statute valid when enacted may become invalid by change in the conditions to which it is applied."

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239, this Court, in holding a statute unconstitutional, said (p. 289):

> "* * * That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another."

As stated by Mr. Chief Justice Hughes in *Abie State Bank* v. *Bryan*, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690, at p. 772:

> "• • • a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."

It was, accordingly, competent for petitioners to show, as they offered to show, that the present product is not within the rationale of the Act; that, unlike the product known as "filled milk" in 1923, Carolene is made under the most modern and sanitary conditions; that it is a wholesome, nutritious product containing all and more of the vitamins, the absence of which in "filled milk", as that product was made in 1923, was the reason for the passage of the Act prohibiting its shipment; and that Carolene is marketed fairly and honestly, without fraud on the public, under labels which clearly and prominently state its true contents and expressly state that it is neither milk nor evaporated milk.

To prohibit completely the sale of such a product, merely because of similarity to another product in looks and taste would be arbitrary and confiscatory. Thus, in *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654, the Court said, at pp. 414-415:

> "'Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way.' *Quong Wing* v. *Kirkendall*, *supra*, 64. • • • Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. • • •

"Nor can such prohibition be sustained as a measure to prevent deception. In order to ascertain whether the materials used and the finished articles conform to its requirements, the Act expressly provides for inspection of the places where such articles are made, sold or kept for sale. * * * Obviously these regulations or others that are adequate may be effectively applied to shoddy-filled articles."

"* * * The business here involved is legitimate and useful; and while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. *Adams* v. *Tanner*, 244 U. S. 590, 596; *Meyer* v. *Nebraska*, 262 U. S. 390; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504."

In its opinion, the Circuit Court of Appeals refers to the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255. That case has, of course, been limited by later decisions, as pointed out by the Supreme Court of Michigan in *Carolene Products Co.* v. *Thompson*, 276 Mich. 172, holding the Michigan Filled Milk Act unconstitutional as in violation of the due process of law clause of the Fourteenth Amendment (p. 182):

"This leaves *Hebe Co.* v. *Shaw, Secretary of Agriculture of Ohio*, 248 U. S. 297 (39 S. Ct. 125), of special interest because it is the bulwark of the State's case. The *Hebe* opinion is not wholly satisfactory as an adoptive authority because it is not demonstrative. It was by a divided Court. And it is at least an open question whether the broad rule of prohibition it announced has not been materially modified by the later statement of the rule of regulation in *Weaver* v. *Palmer*, *supra*."

The learned Circuit Court of Appeals held that the legislative power extends to the banning of an "innocent article" which falls within a prohibited class, citing *Carolene Products Co.* v. *Hanrahan*, 164 S. W. (2nd) 597 (Ky. 1941). That case arose on a demurrer in an action by Carolene for a declaration of rights and injunctive relief against threatened prosecutions by local authorities under the Kentucky Filled Milk Law. The Kentucky court held that the question of constitutionality was foreclosed by the "controlling" decision of this Court in *United States* v. *Carolene*, 304 U. S. 144—the Kentucky Court ignoring completely the fact that *United States* v. *Carolene* came up on a demurrer by which the defendant there had admitted that the product there involved was an "adulterated article of food injurious to the public health".

The Circuit Court of Appeals also said that Congress may bar goods which "may be the subject of a fraudulent sale", although the goods themselves may not be injurious, citing *Seven Cases of Eckman's Alterative* v. *U. S.*, 239 U. S. 510, 36 S. Ct. 190, 60 L. Ed. 411. That case does not sustain the proposition for which the learned Circuit Court of Appeals cited it; indeed, it had nothing to do with that proposition. The only question there involved, and the only point there decided, was that where a shipper of bottles containing what purports to be medicine, inserts in each package a circular reading "We know it has cured and that it has and will cure Tuberculosis," the shipper was guilty of misbranding in violation of Section 8 of the Food & Drugs Act. It is a far cry from that case to this one. That case involved no question of the right to prohibit the shipment of a nutritious product, sold under honest labels, and without fraud because, forsooth, some unscrupulous dealer, over whom

the manufacturer has no control, and without the manufacturer's knowledge, might palm it off as something it makes no pretense of being. There is nothing in the present case to show that any one has ever sold Carolene, or attempted to sell it, as milk or as anything but Carolene.

Although the Act was held constitutional as against the objections urged in *U. S. v. Carolene*, 304 U. S. 144, it will be recalled that that case came up on a demurrer which, for the purposes of that case, admitted the allegation in the indictment that the product there involved was injurious to public health and a fraud upon the public, leaving for decision only the question whether or not Congress had power to prohibit the shipment of such an article of food in interstate commerce. The question now presented is an entirely different one.

## POINT IV.

**The Government wholly failed to connect the individual petitioners with the making of the shipments referred to in the indictment.**

As Dobie, J., of the Circuit Court of Appeals, said in his opinion below:

> "In this connection the Government expressly admits that there is no evidence in the record to show that either of the individual defendants personally made, or even had any personal knowledge of, the eight specific shipments set out in this indictment."

The individual petitioners have been held liable solely because (App. p. 46):

> (1) they were the "directing heads" of Carolene Products Company; and

(2) Carolene Products Company had made "extensive shipments" of the product in interstate commerce during the year 1941.

The relevant facts are these: The petitioner Hartke was president of Litchfield Creamery Company and vice-president of Carolene Products Company; the petitioner Hauser was president and a director of Carolene. The offices of both companies were maintained at the Litchfield Creamery Company plant at Litchfield, Illinois, which was several hundred miles from Warsaw, Indiana, from which the shipments here involved were made (App. pp. 63; 65; 66-67).

The individual petitioners rarely came to the Warsaw plant; each of them had been there possibly three times in the five years preceding the trial, and none of these visits was during 1941, the year in which the shipments here involved were made (App. pp. 270-271).

There is neither claim nor proof that either of the individual petitioners took, or knew of, the orders pursuant to which the shipments here involved were made, or that either of them knew of, or participated in, the preparation of any of the cases for shipment, or their delivery to the carrier; neither is there claim or proof that either of the individual petitioners ever gave shipping directions, or that they, or either of them, had personal knowledge of the shipments, or that the shipments were ever reported to either of them (App. pp. 88; 270-271).

There is no proof or claim that the invoices for any of the shipments here involved, or the checks in payment thereof, were ever seen by, or the contents thereof communicated to, either of the individual petitioners.

Under the cases, we submit, even the "directing heads" of a corporation may not be found guilty of the making

of a particular illegal shipment, in which they did not participate, and of which they had no personal knowledge, merely on proof that the corporation was in the habit of making shipments of the same character.

The rule applicable to the state of facts disclosed by this record is epitomized by Fletcher thus:

> "A corporate officer, without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation, unless the act was done with the knowledge and under the authority of the accused."
>
> 3 *Fletcher, Private Corporations*, Section 1349, p. 880.

The foregoing statement of the rule is supported by numerous authorities.

Although *National Cash Register Company* v. *Leland*, 94 Fed. 502, was an action to recover damages for the infringement of a patent, the principles laid down in it have expressly been held applicable to criminal prosecutions (*U. S. v. Winslow*, 195 Fed. 578). At page 508 of the *National Cash Register* case, in discussing the liability of directors and officers of the corporation for acts "committed by the corporation under their direction", the Court said:

> "That is to say, one who does not actually and physically commit the tortious act may yet be liable *if he directs or commands its commission, or if he sustains to the person actually committing it the relation of master or principal; but when the tort is not committed by his direction or command, nor committed by one who stood to him in the relation of*

*agent or servant, he is not liable, though the tort was committed by the subordinate agent of his own principal, over which subordinate he had authority as an agent of higher rank.* *Bath* v. *Caton*, 37 Mich. 199; *Paper Co.* v. *Dean*, 123 Mass. 267. The corporation may be liable, not only for the tort of its agent, committed in obedience to its orders, but also for a tort committted without orders, or even in direct disobedience to orders, if that tort is committed by the corporation's agent in the course of his employment. *The director, on the other hand, is ordinarily liable only for those torts which he himself commits, or the commission of which he specifically commands.*

The Government has not made any effort to establish personal participation in, or even knowledge of, the shipments here involved by the individual defendants, and this indictment, it should be noted, is not one for conspiracy with others.

The fact that the individual petitioners are joined with a corporation of which they were officers does not alter the proof required to sustain a conviction against them *individually*, and mere proof that the shipments were made by the corporation furnishes no basis for criminal liability on their part, unless it be shown—as it was not shown here—either that they personally participated in the making of the shipments on behalf of the corporation, or that it was under their authority and by their direction that other corporate agents made them on behalf of the corporation.

The Circuit Court of Appeals has referred to a number of cases for the proposition that the directing heads of a corporation may be held criminally liable for the acts of subordinates done in the normal course of business re-

gardless of personal knowledge. A reading of these cases discloses that the cases are not in point. In a number of the cases the charge in the indictment was a conspiracy one, which is not present in the instant case. In the other cases the individual defendant had either personal knowledge or supervision of the acts complained of, or furnished the instrumentality for committing a crime with knowledge that it was so to be used. In none of the cases cited were the individual defendants held liable simply because they were the "directing heads" of the corporation.

## POINT V.

**The calling by the Government of the individual petitioners to the stand as Government witnesses was an invasion of their constitutional rights, in that it required them to be witnesses against themselves. Consequently the conviction of the individual petitioners cannot stand.**

The Fifth Amendment to the Constitution of the United States provides:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, * * *".

The Code provides (28 U. S. C. 632) that in the trial of indictments "the person so charged shall, at his own request but not otherwise, be a competent witness".

The Government commenced the presentation of evidence upon its direct case by calling, as a witness, the petitioner William H. Hartke (App. p. 61), and he was interrogated, among other things, with respect to his residence and his connection with the petitioner Carolene Products Company (App. pp. 61-64.)

Later in the trial, and also as part of its direct case, the Government called, as its witness, the petitioner Charles Hauser.

Again, petitioner's counsel objected to the infringement of a defendant's constitutional privilege (App. pp. 191-2) and again Government counsel took the position that he was entitled to interrogate the petitioner with regard to acts of Carolene Products Company.

Diligent search of the authorities has not disclosed a reported case where a defendant on trial in a criminal case in a United States Court was called and required to testify as a witness for the Government. With the exception of the present case, the Government has, in criminal trials, scrupulously complied with the clear mandate of the Fifth Amendment and the statutory provision referred to above, and has not called a defendant as a witness. Indeed, even where the defendant has voluntarily taken the stand in his own behalf, the Government's cross-examination may not extend beyond the precise subjects to which defendant himself has opened the door by his direct testimony.

See:

*Wilson v. United States*, 4 F. (2d) 888 (C. C. A. 8th Cir.);
*Tucker v. United States*, 5 F. (2d) 818 (C. C. A. 8th Cir.).

The Circuit Court of Appeals stated that all the evidence elicited from the individual petitioners was covered by exhibits or stipulation. This is not correct. The petitioner Hartke testified that he was connected with the Litchfield Creamery Company since 1920 and with the petitioner Carolene Products Company since its incorporation. This was not covered by any stipulation or exhibit, and the evidence was highly prejudicial, particularly since

guilt of the individual petitioners was predicated upon their presumed knowledge of the activities of the corporation during prior years.

It is respectfully submitted that the Court erred in holding that no reversible error was committed by permitting the Government to call the individual petitioners to the stand.

The constitutional privileges of the individual petitioners against being called as witnesses against themselves in a criminal case having been violated, their conviction may not stand.

## CONCLUSION.

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

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